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No. 82-63.

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

CITY OF REVERE,
PETITIONER,

v.

MASSACHUSETTS GENERAL HOSPITAL,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Reply Brief for Petitioner.

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Argument.

I. WHETHER A MUNICIPALITY HAS A CONSTITUTIONAL OBLIGATION TO FUND THE COSTS OF MEDICAL TREATMENT OF AN INJURED SUSPECT IS A SUBSTANTIAL FEDERAL QUESTION AND THEREFORE, THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT OF THE SUPREME JUDICIAL COURT.

In its brief, respondent Massachusetts General Hospital ("MGH") contends that this Court lacks jurisdiction to review

the judgment of the Supreme Judicial Court.[1] Characterizing the Supreme Judicial Court's holding as a remedial rule to implement "accepted constitutional norms," MGH suggests that only state law issues are involved, that no substantial federal question is presented to this Court for review, and that independent and adequate state law grounds support the holding below. These contentions have no merit in this case.

It is settled that this Court's power over state court judgments is limited to correcting errors in the adjudication of federal rights and that the burden is on the petitioner city of Revere ("Revere") to establish the existence of a federal claim. See, *e.g.*, *Webb* v. *Webb*, 451 U.S. 493, 495-497 (1981); 28 U.S.C. § 1257. Similarly, the federal claim must be a substantial one and must have been properly raised in the state courts. *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955); *Parker* v. *Illinois*, 333 U.S. 571, 574-575 (1948); *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969). Finally, there cannot be an adequate and independent state law ground upon which the decision rests, otherwise resolution of the federal claim "could amount to nothing more than an advisory opinion." *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977), quoting from *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945). Notwithstanding MGH's novel construction of the opinion below, this Court may safely review the holding of the Supreme Judicial Court consistent with these principles.

First, the Supreme Judicial Court clearly based its ruling on a federal claim, arising solely under the United States Constitution.[2] As the Supreme Judicial Court stated, 385 Mass. at 774, 434 N.E.2d at 1865, A. 24:

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[1] See Res. Br. at 10-12.

[2] Although the Supreme Judicial Court noted that the Massachusetts Constitution, Article 26 of the Declaration of Rights, also contains a prohibition against "cruel and unusual punishments," the court declined to consider this provision since MGH did not raise or argue it. 385 Mass. at 776 n.6, 434

> The hospital claims, both on contractual and constitutional grounds, that Revere is obligated to pay for the necessary medical services provided to Kivlin. While there is no contractual basis for recovery, ***we hold that the constitutional prohibition against cruel and unusual punishment, embodied in the Eighth Amendment to the United States Constitution, requires that Revere be liable*** to the hospital for the medical services rendered to Kivlin during his first stay at the hospital. . . . (Emphasis added.)

On no fewer than five occasions later in its opinion, the Supreme Judicial Court reiterated that Revere's duty to reimburse MGH was constitutionally mandated. The opening sentence in the section of the court's opinion on the Eighth Amendment leaves no doubt as to the source of Revere's liability. As the Supreme Judicial Court stated, 385 Mass. at 776, 434 N.E.2d at 187-188, A. 26:

> The hospital argues that the prohibition against deliberate indifference to the medical needs of prisoners contained implicitly in the Eighth Amendment, *Estelle* v. *Gamble*, 427 U.S. 97 (1976), *compels a government agency* or division responsible for supplying those medical needs *to pay for them*. We agree. (Emphasis added and footnotes omitted.)[3]

N.E.2d at 187-188 n.6, A. 26. MGH was content, perhaps, to rely on the United States Constitution since the full text of Article 26 reads as follows: "No *Magistrate* or *court of law*, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments." (Emphasis added.) *Cf.*, *Ingraham* v. *Wright*, 430 U.S. 651, 664 (1977).

[3] That the constitutional obligation included *funding*, as well as a duty to *provide* medical care, can be seen by the court's rejection of Revere's monetarily based concerns. ("That funds may not have been appropriated for this purpose is no excuse, because inadequate funding will not excuse deprivation of rights guaranteed by the Constitution." 385 Mass. at 779, 434

Second, there can be no doubt that whether the constitution itself imposes an affirmative funding obligation on government is a substantial issue. Compare, *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, *supra*, and *Zucht* v. *King*, 260 U.S. 174, 176 (1922). The Supreme Judicial Court's determination that the Eighth Amendment contained such a duty to pay conclusively establishes that the question was properly raised in the state court. See, *Payton* v. *New York*, 445 U.S. 573, 582 n.19 (1980); *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959). Similarly, it cannot be claimed that this issue is wholly devoid of merit or is otherwise plainly foreclosed by prior opinions of this court. See, *Equitable Life Assurance Society* v. *Brown*, 187 U.S. 308, 311 (1902). Therefore, the writ of certiorari granted in this case need not be dismissed as improvidently granted for want of a substantial federal question. See, *Duncan* v. *Tennessee*, 405 U.S. 127 (1972); *Palmer Oil Corp.* v. *Amerade Petroleum Corp.*, 343 U.S. 390 (1952).

Finally, there can be no doubt that there is no adequate and independent state ground upon which the judgment below could be upheld.[4] On the contrary, there can be no adequate and independent state law basis for the ruling since the Supreme Judicial Court itself held that it would be *illegal* under state law for Revere to pay MGH in this case for the costs of Kivlin's care.

Massachusetts, unlike other states, insists upon strict compliance with all statutory requirements prior to allowing any

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N.E.2d at 189, A. 29.) (See also n.10, 385 Mass. at 779, 434 N.E.2d at 189, A. 29: "The *result* that we reach *under the constitutional banner* is entirely consistent with the legislative policy toward prisoners." (Emphasis added).)

[4] Indeed, MGH can point to no specific statute, Massachusetts rule or common law principle upon which the ruling below could be based. MGH merely — and perhaps hopefully — speculates that the Supreme Judicial Court's ruling can be read "as fashioning a state remedy." Res. Br. at 14.

form of contractual recovery against a municipality.[5] This strict rule prevents recovery unless the municipality was authorized to make the contract,[6] the contract was made by a duly authorized agent of the municipality,[7] and the municipality complied with all statutory formalities required for the making of contracts.[8] In the absence of complete adherence to these rules, no form of contractual recovery, either on an express contract, an implied contract, or on a quantum meruit theory, is permissible under the law of the Commonwealth. See, *Central Tow Co.* v. *Boston*, 371 Mass. 341 (1976); *Adalian Bros.* v. *Boston*, 323 Mass. 629 (1949).[9]

Therefore, there need be no doubt that no adequate and independent state ground supports the judgment below since no

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[5] Compare *Massachusetts General Hospital* v. *Revere*, 385 Mass. at 774-776, 434 N.E.2d at 186-187, A. 24-26 with 1A C.J. Antieau, Municipal Corporation Law, § 10.01 (1982 ed.).

[6] *Lord* v. *Winchester*, 355 Mass. 788 (1969).

[7] *Richard D. Kimball Co.* v. *Medford*, 340 Mass. 727 (1960).

[8] *Urban Transport, Inc.* v. *Mayor of Boston*, 373 Mass. 693 (1977) and cases cited.

[9] The Supreme Judicial Court has even refused to mitigate the harshness of these rules by adopting exceptions based upon equitable estoppel or similar principles. Rather, the Massachusetts rule is that estoppel may not be invoked against a local government or a local official. See, *e.g.*, *Doris* v. *Police Commissioner of Boston*, 374 Mass. 443, 449 (1978) and cases cited.

Similarly, the Supreme Judicial Court has recognized that these rules often produce extremely harsh results. The importance to the public of preventing unauthorized and uncontrolled municipal spending, however, has outweighed the interest of the private party. As the Supreme Judicial Court stated after denying recovery to the plaintiff in *Richard D. Kimball Co.*, *supra*, 340 Mass. at 732: "This is a harsh result, as there is no suggestion that the plaintiffs did not fully and faithfully perform the services requested of them. But, as we said earlier, one who contracts with a municipality can recover only if the statutory safeguards governing its contracting powers are satisfied. Any other rule, however appealing it may be in an individual case, would in the long run render such safeguards worthless; it would be another instance of a hard case making bad law."

such law exists.[10] Compare, *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 292-295 (1982). The Supreme Judicial Court recognized this conflict between state law and its interpretation of federal constitutional requirements and specifically and properly ruled in favor of the supremacy of federal law.[11] Citing *Smith* v. *Sullivan*, 611 F.2d 1039, 1043-1044 (5th Cir. 1980), the Supreme Judicial Court stated, "Further, that such payment [Revere to MGH] may be a violation of state or local law will not avail Revere of any relief from the payment." *Massachusetts General Hospital* v. *Revere*, 385 Mass. at 779, 434 N.E.2d at 189, A. 29. The Supreme Judicial Court could hardly be said to have fashioned a state law rule in conflict with its own law.

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[10] In fact, there is a strong argument that the interpretation urged by MGH would be unconstitutional under the Massachusetts Declaration of Rights. If, as MGH suggests, the Supreme Judicial Court simply adopted *as state law* the rule that cities and towns pay hospitals for emergency medical treatment rendered to criminal suspects, such a ruling might run afoul of the state doctrine of separation of powers. Under Article 30 of the Massachusetts Declaration of Rights, "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them. . . . The judicial shall never exercise the legislative and executive powers, or either of them. . . ." Aside from the other difficulties under state law with MGH's suggested state law remedy, a judicially ordered spending rule, such as the one in this case, could well run afoul of Art. 30. See, *Moe* v. *Secretary of Administration & Finance*, Mass. Adv. Sh. (1981) 464, 476-477 and cases cited.

[11] Notwithstanding this conflict, MGH purports to find support for its theory of the state created "implementing rule" by the absence of any statement in the decision that it was *compelled* by federal law. See Res. Br. at 14 n.19 citing *Commonwealth* v. *Sheppard*, 387 Mass. 488, 489 (1982). The statement in *Sheppard* that MGH cites, however, prompted two justices to write separate opinions critical of the majority's "grudging acceptance" of the controlling federal rulings. *Commonwealth* v. *Sheppard*, 387 Mass. 488, 509 (Liacos, J., concurring). There can be little doubt that in this case the Supreme Judicial Court fully endorsed the federal rule it created.

Rather than fashioning a state law remedy, the Supreme Judicial Court's decision that Revere must reimburse MGH for the cost of the medical treatment rendered was compelled by its erroneous interpretation of the United States Constitution. This Court, then, has jurisdiction under 28 U.S.C. § 1257(3) to review and correct the judgment of the Supreme Judicial Court.

II. The Issue of MGH's Standing is Subject to Review in This Court.

MGH contends that the issue of its standing to raise the constitutional rights of others may not be reviewed by this Court. MGH's argument rests on two grounds: (1) as a matter of state law, MGH maintains that Revere waived the standing issue in the court below; and (2) if not waived below, then there is no jurisdiction to raise the standing issue in this Court since it is a matter of state, not federal law. While MGH's argument has merit in the abstract, the principles upon which MGH's assertions rest have no application to this case.

Had the Supreme Judicial Court simply treated the issue of standing as waived, this Court's review would be limited.[12] See, *Parker* v. *Illinois*, 333 U.S. 571, 574-575 (1948); *Wood* v. *Georgia*, 450 U.S. 261, 265 (1981); see also, *Vachon* v. *New*

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[12] Revere would nonetheless have a strong argument that the procedural rule ought not to bar review of the standing issue. In issuing its ruling that the Eighth Amendment itself contained a guarantee that MGH would be paid, the court went beyond any assertion advanced by MGH. Rather, MGH had merely argued in its brief that the constitution created a *duty* on the part of Revere to provide medical care. The obligation to pay arising from this duty was still an obligation created under state law. *Cf., Lutheran Medical Center* v. *City of Omaha*, 204 Neb. 292, 281 N.W.2d 786 (1979). Under these circumstances, Revere is not foreclosed from raising the standing issue in this Court by its alleged waiver below.

Hampshire, 414 U.S. 478 (1974). However, the Supreme Judicial Court, while noting its rule of appellate practice providing for waiver of issues not briefed, proceeded to decide the question. See 385 Mass. at 776-777 n.7, 434 N.E.2d at 188 n.7, A. 26-27. Having decided the question, even though it was not bound to do so, the Supreme Judicial Court's ruling is now subject to review in this Court. See *WHYY, Inc.* v. *Borough of Glassboro*, 393 U.S. 117, 119 (1968).

Similarly, the Supreme Judicial Court decided the standing issue as a matter of federal, not state law. The applicable standard was taken from *Barrows* v. *Jackson*, 346 U.S. 249 (1953). As additional authority, the Supreme Judicial Court cited a treatise on the *federal* courts. Although the Supreme Judicial Court could have applied its own rules of standing, it chose not to do so. Therefore, state law rules do not prevent this Court from reviewing the decision below on the merits, *Orr* v. *Orr*, 440 U.S. 268, 277 (1979), and the rule of *Doremus* v. *Board of Education*, 342 U.S. 429 (1952) is inapposite.

III. The Constitution Imposes No Affirmative Obligation on Revere to Reimburse MGH for the Costs of Emergency Medical Treatment.

MGH's argument in support of the judgment below on the merits is based upon three claims: First, MGH asserts that the suspect was under arrest by Revere police and therefore ought to be classified as a "pre-trial detainee."[13] Second, as a pre-trial detainee, the suspect, according to MGH, was entitled as a matter of constitutional law to have Revere supply him with necessary medical care.[14] Finally, since Revere was obligated

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[13] See Res. Br. at 31-32.

[14] See Res. Br. at 10 n.11.

to *provide* medical care, it was also obligated as a matter of constitutional law *to pay* in the first instance for the care ultimately provided.[15] This equation cannot withstand scrutiny in light of applicable constitutional standards.

At the outset, it is essential to analyze the constitutional interests at stake in this case. Notwithstanding MGH's assertion to the contrary, any affirmative duty to provide medical treatment can only arise from the specific constitutional guarantee that creates this duty. For example, in *Estelle* v. *Gamble*, 429 U.S. 97 (1976), the state's duty to provide medical care arose only as necessary to prevent the infliction of cruel and unusual punishment, a punishment that would exist by permitting "unnecessary suffering" for no "penological purpose." *Id.* at 103. Similarly, an institutionalized person, not convicted of any crime, would be entitled to adequate medical care and other conditions of confinement consistent with the detainee's liberty interest and to prevent the imposition of punishment. See *Youngberg* v. *Romeo*, ___ U.S. ___, 102 S.Ct. 2452, 2459 (1982); *Bell* v. *Wolfish*, 441 U.S. 520, 535 (1979). Neither *Estelle*, *Youngberg*, nor *Bell* mandate a constitutional right to medical care; rather, medical care is the means to prevent cruel (or punitive) conditions of confinement.

Similarly, the injured suspect in this case possessed no independent constitutional right to medical care. Instead, the suspect enjoyed at most a "liberty" interest in being free from the infliction of punishment that would have come from leaving him helpless and his injuries untreated. Revere vindicated these "liberty" interests by securing an ambulance to transport the suspect to MGH. Therefore, in the context of this case, MGH is incorrect is asserting the suspect had an independent constitutional right to have Revere supply him with free medical care.

MGH's argument also breaks down when it characterizes the suspect as a "pre-trial detainee." Rather, it is important to

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[15] See Res. Br. at 30-31.

recognize that the fact-pattern in this case concerns an on-the-street injury, not the medical needs of an institutionalized prisoner. As such, Revere's "custody" of the suspect's body amounts to little more than legal fiction.[16] Aside from having inflicted the injury in this case,[17] Revere's association with the suspect is no different than its relationship with any other citizen suffering from an emergency, on-the-street injury.

Finally, MGH incorrectly equates providing with paying, at least as to the "initial responsibility" for the costs of medical care.[18] In fact, the only time this equation succeeds is when

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[16] As the Supreme Judicial Court intimated, the concept of "custody" is an elusive one. As the court stated, "That a person is 'in custody' for one purpose does not make him 'in custody' for all purposes. The logic of the . . . proscription of indifference to serious medical needs of prisoners extends only to those in physical custody." 385 Mass. at 780 n.11, 434 N.E2d at 190 n.11, A. 30. Presumably then, under the Supreme Judicial Court's formula, a person would have to be either a prisoner or "under arrest" to be entitled to free medical care and the petitioners in *Jones* v. *Cunningham*, 371 U.S. 236 (1963) and *Hensley* v. *Municipal Court*, 411 U.S. 345 (1973) would be ineligible. See 385 Mass. at 778, 434 N.E.2d at 188-189, A. 28.

The arrest criterion, however, has many logical shortcomings. It excludes all persons involved in custodial interrogations. See *Miranda* v. *Arizona*, 384 U.S. 436 (1966). It excludes all persons stopped by police merely for investigative purposes, either on the street, *Terry* v. *Ohio*, 392 U.S. 1 (1908), in a car, *Delaware* v. *Prouse*, 440 U.S. 648 (1979), or in another public place. See *United States* v. *Mendenhall*, 444 U.S. 544 (1980). It would also exclude the petitioners in *Hurtado* v. *United States*, 410 U.S. 578 (1973). The inability to distinguish these cases from the Supreme Judicial Court's rule demonstrates the faulty reasoning involved. Limiting medical care to detainees at custodial institutions, however, creates no such logical difficulties.

[17] This fact, however, is not pertinent to MGH's argument or the reasoning of the court below. The suspect's injuries — had they been self-inflicted or suffered at the hands of a cohort — would still have required treatment, medical care for which the Supreme Judicial Court and MGH would hold Revere liable to pay.

[18] See Res. Br. at 30. The Supreme Judicial Court however makes no reference whatsoever to "initial" responsibility.

the recipient of the service is indigent. Thus, the rule of *Griffin* v. *Illinois*, 351 U.S. 12 (1956) and *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) applies only to indigents.[19]

MGH's argument, therefore, applies an incorrect constitutional standard to the wrong person in an inappropriate setting. Rather than being constitutionally required to provide free medical care to the injured suspect, Revere's duty was to prevent a deprivation of liberty as a result of an inability to secure necessary medical attention. This right was fully vindicated in this case. Neither the Eighth Amendment nor the Fourteenth Amendment requires Revere to do more by reimbursing MGH for the cost of the medical care that was ultimately rendered.

Conclusion.

For all of the foregoing reasons, MGH's arguments that this Court lacks jurisdiction, that the issue of MGH's standing cannot be reviewed, and that Revere is obligated by the constitution to guarantee free medical care to injured suspects, are without merit. Revere respectfully requests that this Court grant the relief sought by petitioner in its brief on the merits.

Respectfully submitted,

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[19] In this case, the record is devoid of any evidence that the suspect was indigent or otherwise unable to pay for treatment.